



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:

**Zatloukal et al.**

Application No.: 09/825,907

Filed: April 4, 2001

For: **METHOD AND APPARATUS FOR  
PREVENTING OVERLOADING  
USING SCALED RECOVERY**

Examiner: Alam, Uzma

Art Unit: 2157

Confirmation No. 3711

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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

In the Final Office Action (FOA) mailed February 27, 2006, the Examiner maintained his rejections of claims 1-3, 5-12, and 14-30. Prior to filing an Appeal Brief, Applicants respectfully request that a panel of examiners formally review the legal and factual basis of the rejections in the application in light of the remarks to follow.

**REMARKS**

In the FOA, claims 1-3, 5, 6, 10-12, 14, 15, 20, and 21-25 were rejected under 35 USC 102(e) as unpatentable over US Patent No. 6,717,915 to Liao.

It is well settled that anticipation under 35 U.S.C. §102 requires the clear and unambiguous disclosure in a single piece of prior art of each and every limitation of a claimed invention. *Electro Med. Sys. S.A. v. Cooper Life Sciences*, 34 F.3d 1048, 1052, 32 USPQ2d 1017, 1019 (Fed. Cir. 1994). Thus, to anticipate the present invention, Liao must clearly and unambiguously disclose every element listed above. Further, it is also well settled that claim terms are to be accorded the meaning given by the Applicant in the specification. See *Phillips v AWH Corp.* (CAFC 03-1269, 03-1286).

Each of independent claims 1, 10, 20, 21, and 22 recite similar features. With respect to claim 1, a method is provided comprising (in part) determining by a client a first back off interval for the client to delay before reattempting to access the shared resource after an unsuccessful attempt; successfully accessing the shared resource by the client, upon expiration of the first back off interval; and determining by the client, based on the successful access of the shared resource by the client, a second back off interval for the client to delay before reattempting to access the shared resource.

Liao provides a method for dynamically adjusting the timing parameters in a data network. The timing parameters may include values for implementing a back off interval for retransmission attempts. However, in Liao, such a back off interval is based on an unsuccessful attempt or an unsatisfactory transmission.

Claim 1 recites a first back off interval established based on the determination that the shared resource is unavailable and then, once access to the shared resource is successful, a determination of a second back off interval based on the successful access. The second back off interval thus sets the time before which a successful attempt may be followed by another attempt by the same client to access the same shared resource. Therefore, the first back off interval and the second back off interval in claim 1 differ in that the first back off interval is based on an unsuccessful attempt to access the shared resource and the second back off interval is based on the successful access of the shared resource. It is this shift that provides for the desired control of the access of the shared resource.

The method of claim 1 thus provides for self-imposed (i.e., client-imposed) restraint and "good citizenship" in which a successful attempt following one or more previously unsuccessful attempts to access a shared resource results in the establishment of a second back off interval to avoid overloading the shared resource as soon as it becomes available and allows for potential access by other client devices that may also have been experiencing an unavailable condition of the shared resource.

Liao, on the other hand, simply adjusts a first back off interval based on unsuccessful or unsatisfactory attempts to transmit data. Liao describes in detail the utilization of various data to determine the optimal back off interval, but at no point describes establishing a second back off interval based on successful access of a shared resource as recited in claim 1.

The FOA cites Column 4, lines 59-67, Column 6, lines 1-25 and 64-67; Column 7, lines 39-67; and Column 8, lines 1-11, for teaching the determination of a second back off interval.

Nowhere in any of the cited passages is the feature taught, namely, (1) determining by the client, (2) based on the successful access of the shared resource by the client, (3) a second back off interval for the client to delay before reattempting to access the shared resource after said successful access.

First, the above feature of claim 1 provides for the determination of the second back off interval to be determined by the client (further discussed in the Response filed on April 27, 2006). There is further no factual assertion in the FOA in this regard. In Liao, the server, alone or in coordination with the mobile device, determines the timing characteristics. Thus, the back off is not a client-imposed restriction, but rather a server driven characteristic based on demands on the server and message timing. This distinction was ignored in the FOA and therefore, there is a factual insufficiency and a resultant failure to establish a proper prima facie case of anticipation.

It should be noted that Column 6, lines 1-25, of Liao discusses the wait time after an unsuccessful attempt and thus provides a determination of a first back off interval. However, there is no teaching of a second back off interval that is based on the successful access of the shared resource by the client. There is also no factual assertion in the FOA that the back off intervals are based on the successful or unsuccessful attempts as clearly recited in the claims. Instead, the FOA suggests the claims simply recite establishing a first and second back off interval, which clearly ignores features of the claims. Thus, there is a further factual insufficiency and, again, a resultant failure to establish a prima facie case of anticipation.

In Liao, after a mobile device has been successful or unsuccessful in accessing a shared resource, a server may analyze the message timing characteristics and, based on unsatisfactory timing characteristics, establish different timing parameters. There is no distinction as to whether there has been success or failure. On the other hand, claim 1 provides a method in which a client establishes a second back off interval based on the fact that the client was (a) successful, and (b) after first being unsuccessful, in accessing a shared resource. Liao fails to provide such a teaching.

Therefore, Liao clearly fails to teach or suggest at least one element of each of the independent claims and, thus, the independent claims are patentable over Liao.

Claims 2-3, 5-9, 11-12, 14-19, and 23-30 are dependent, directly or indirectly, on claims 1, 10, 20, 21, and 22, incorporating their features respectively, and thus are patentable over Liao for at least the reasons discussed above.

Furthermore, with respect to claim 2, the Office Action cites Column 6, lines 19-44, of Liao. Liao teaches the establishment of a back off interval based on an unsuccessful attempt. Liao does not teach establishing a second back off interval. And further, Liao does not teach, and the FOA does not adequately support, that the second back off interval is less than the first back off interval as recited in claim 2. Claim 11 contains language similar to that of claim 2 and is patentable for at least the reasons discussed above.

With respect to claim 3, the Office Action also cites Column 6, lines 19-44, of Liao. In such a teaching, Liao teaches that successive retransmission attempts should be farther and farther apart (see also Fig. 3, and Column 8, lines 1-5). Claim 3, however, recites that additional back off intervals after each successful attempt should be less in duration than the previous back off interval. Clearly, no such teaching is provided in Liao and the factual basis for the rejection is flawed. Claims 12 and 23-25 contain language similar to that of claim 3 and are patentable for at least the reasons discussed above.

With respect to claim 19, the Office Action cites Column 7, lines 52-67, and Column 8, lines 1-16, of Liao. Nowhere in Liao is there taught a counter to determine how many unsuccessful access attempts of the shared resource have been made by the client, wherein the counter value is not reset to zero upon the client successfully accessing the shared resource. The cited portion of Liao merely discusses establishing timing parameters, in particular, in which subsequent unsuccessful attempts are followed by an attempt after a longer back off interval. Liao clearly fails to teach the features of claim 19 and, thus, the factual basis for the rejection is flawed.

With respect to claim 26, the Office Action cites Column 6, lines 19-44, of Liao. However, the cited teaching does not teach the second back off interval being based on the number of unsuccessful attempts by the client. First, Liao does not provide a second back off interval. Second, nowhere in Liao is there a teaching of a back off interval being established after a successful attempt, where such an interval is based on the number of unsuccessful attempts by the client. The only teaching in Liao of modifying the transmission frequency indicates that, after an unsuccessful attempt, a retransmission time period may be lengthened. Thus, Liao fails to teach the features of claim 26 and the factual basis for the rejection is flawed. Claims 27-30 contain language similar to that of claim 26 and are patentable for at least the same reasons.

Claims 7-9 and 16-18 are rejected under 35 USC 103(a) as being unpatentable over Liao in view of US Patent No. 6,185,184 to Mattaway (Mattaway). Claims 7-9 and 16-18 depend, directly or indirectly, on claim 1 or claim 10, incorporating the features of claims 1 and 10, respectively. Therefore, as claims 1 and 10 are patentable over Liao, so are claims 7-9 and 16-18, by virtue of at least their dependency. Since Mattaway does not remedy the above discussed deficiencies of Liao, claims 7-9 and 16-18 are patentable over Liao alone or in combination with Mattaway.

### Conclusion

In view of the foregoing, Applicant respectfully submits that claims 1-3, 5-12, and 14-30 are in condition for allowance. If the Examiner has any questions, he is invited to contact the undersigned at (503) 796-2844. Please charge any shortages and credit any overages to Deposit Account No. 500393.

Respectfully submitted,

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